Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

TERRY SMITH,

Petitioner,

v.

STATE OF COLORADO,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Colorado

PETITION FOR WRIT OF CERTIORARI

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103 pp

QUESTIONS PRESENTED

Whether the Colorado Supreme Court's ruling that expands the meaning of an investigatory stop to include actions that by the totality of circumstances amount to an arrest violates the Fourth Amendment.

1. When the driver of a vehicle who makes no overt actions other than to arrive at the scene of an ongoing traffic stop of another vehicle, is subject to an investigatory stop which includes, a) being ordered at gunpoint to throw his keys out of the vehicle window, b) being ordered to get out of the car and lie down, c) being handcuffed, and d) being subjected to a complete vehicle search?

2. When the police characterize their actions as an arrest under their subjective and objective view were their actions proper under a theory of an investigatory stop?

LIST OF PARTIES

The State of Colorado and Terry Smith were the parties below.

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CONSTITUTION

U.S. Const. amend. IV 1, 4

OPINIONS BELOW

Review is sought of the opinion of the Colorado State Supreme Court, *People v. Terry Smith*, 00SA047, issued September 11, 2000.

JURISDICTION

Petitioners seek review of the opinion and judgment of the Colorado State Supreme Court.

CONSTITUTIONAL PROVISIONS INVOLVED

This action is brought to this court under the Fourth Amendment to the United States Constitution. The Fourth Amendment states: The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

The defendant was charged with possession with intent to distribute a controlled substance in violation of § 18-18-405(1)(a) and (2)(a)(I)(F-3); possession of a controlled substance, § 18-18-405(1)(a) and (2)(a)(I)(F-3); possession of twenty-five grams or more of a controlled substance, § 18-18-405(3)(a)(I)(5-4); and with the special

offender sentencing provision of § 18-18-407(1)(f)(F-2), 6 C.R.S. (1999).

The district court held the defendant was not subjected to an investigatory stop but rather was improperly arrested by the officers at the time he got out of his vehicle (v.II, pp. 69, 70-72). Holding that the actions of the police here exceeded the degree of intrusion justified by the circumstances, the court found the officers made a full custodial arrest without probable cause based, *inter alia*, on the number of officers involved, the ordering of the defendant out of his car at gunpoint, the defendant holding his hands behind his head, and his being handcuffed and placed on the ground (v.II, p. 71). The district court further held the actions of the officers were unreasonable for an investigatory stop (v.II, p. 73).

STATEMENT OF FACTS

At the suppression hearing Denver Police Officer Charles testified he that he was working solo in his police car near an on-ramp to Interstate 70 at Peoria Street around 2:50 a.m. March 15, 1999, when he observed a Jeep Cherokee with an obstructed windshield.

Using the overhead lights on his car, the officer stopped the car near another ramp to the Interstate where it was dark but also near a street light. The officer made contact with the lone female driver of the car and asked for her driver's license, registration, and proof of insurance. No record for the plate number was found. Jones returned to the car and copied the vehicle identification number. Upon entering the VIN number into the police

computer Jones determined the car had been stolen in Denver (v.II, pp. 4-8).

Jones informed the police dispatcher he had stopped a stolen car. During the time Jones was on the radio with the police dispatcher he observed the female driver of the stopped car make a call and another vehicle (a GMC Suburban) being driven by the defendant pulled in behind the police car to a distance of between half a car and a full car length (v.II, pp. 8, 10). Jones advised the police dispatcher that this other vehicle had pulled in behind him and requested back-up police units.

Upon arriving, Sergeant Rodarte emerged from his car. Officer Jones emerged from his car. Other backup arrived, and the officers approached the Suburban with their weapons drawn and ready, for officer safety.

The testimony of Officer Jones was that at no time did the defendant do anything wrong. He simply sat in his car. It was the fact that he was sitting there that concerned Officer Jones and caused him some anxiety.

They ordered the defendant out of the car. Officer Rodarte approached the car from the rear and Officer Jones from the front. They ordered him to toss the keys out the window. They ordered him to the ground and to put his hands laced behind his head, all the while at gunpoint. He was immediately handcuffed. At approximately the same time, another car pulled up, another police car providing assistance. At the scene of the incident, there were as many as four police officers.

REASONS TO GRANT THE WRIT

1. THE COLORADO SUPREME COURT ERRED IN DETERMINING THAT A STOP CHARACTERIZED BY THE POLICE AS AN ARREST WAS VALID AS AN INVESTIGATORY STOP, AND THAT THE ACTIONS OF THE POLICE DID NOT VIOLATE THE FOURTH AMENDMENT.

The distinction between a valid investigatory stop and a custodial arrest is based on a "reasonableness" standard when viewing the facts in the totality of their circumstances. This test, and the fact that the distinction between the two styles of police/citizen interaction is fluid, leads to decisions that ultimately cross the line and violate the Fourth Amendment. The Colorado State Supreme Court's ruling in this case was based on a string of decisions which allows the police to use an ever increasing level of force and still be construed as a valid investigatory stop. *People v. Hughes,* 767 P.2d 1201 (Colo. 1989), *People v. Rodriguez,* 945 P.2d 1351 (Colo. 1997), *People v. Archuletta,* 980 P.2d 509 (Colo. 1999). The facts in this case lead to the conclusion that the police went too far and indeed violated the Fourth Amendment. The driver of a car stopped and observed a traffic stop of another vehicle; the driver of the vehicle did not move or take any actions other than observing the traffic stop. The police approached the car and ordered the driver to first throw out his keys and then get out of the vehicle and lie down to be handcuffed. This was done with the police having their weapons drawn.

The acts of the police, viewed in isolation, arguably do not rise to the level of an arrest. However, when viewed in the totality of the circumstances, the police

actions do rise to the level of an arrest. There were at least four police officers on scene when the search occurred. The district court below recognized that, had there been only one officer, the actions of the police would have been proper. Because there were no less than four officers on scene, with the driver of the vehicle simply sitting in his car, the actions of the police rise to the level of a custodial arrest.

CONCLUSION

The ruling of the Colorado Supreme Court will act to significantly expand the definition of an investigatory stop to include practically any police action and will act to swallow the distinction between a custodial arrest and a valid investigatory stop. For this reason and those stated above, Petitioner requests that this court grant this Petition.

Respectfully submitted,

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SUPREME COURT, STATE OF COLORADO
No. 00SA47 September 11, 2000

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff-Appellant,

v.

TERRY SMITH,
Defendant-Appellee.

Interlocutory Appeal from the District Court City and County of Denver, Case No. 99CR1071
Honorable Robert S. Hyatt, Judge

EN BANC ORDER REVERSED AND CASE REMANDED

A. William Ritter, Jr., District Attorney
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Attorneys for Plaintiff-Appellant

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JUSTICE KOURLIS delivered the Opinion of the court.

JUSTICE COATS does not participate.

In this interlocutory appeal, the State challenges a suppression order of the trial court. The trial court held that the amount of force used by police during a traffic stop escalated the encounter into an arrest, which was not supported by probable cause. Therefore, the trial court

suppressed the evidence obtained from a search of the defendant's vehicle.

We disagree with the trial court's conclusions of law. Although the police did display force, their conduct was not unreasonable in light of the circumstances the officers faced. Accordingly, we characterize this police-citizen encounter as an investigatory stop rather than an arrest. We further find that the investigatory stop met the reasonableness standards of the Fourth Amendment. As part of the stop, the police were entitled to conduct a protective search of Smith's vehicle, and the evidence at issue is admissible under the plain view doctrine. Accordingly, we reverse the trial court's suppression order.

I.

At 2:50 a.m. on March 15, 1999, Denver police officer Jones stopped a Jeep Cherokee on I-70 for a windshield obstruction violation. Jones was on solo patrol at the time. He approached the car and asked the driver and the lone occupant, Natalie Williams, for her license and vehicle registration. Williams handed the officer her license, but told him that since the car belonged to a friend, she did not have registration paperwork. Officer Jones returned to his vehicle and ran a computer check on the license plate number of the vehicle, which did not reveal any problems. However, the officer then ran a computer search on the vehicle identification number (VIN) for the Jeep and discovered that the Jeep was on record as having been stolen.

While Officer Jones was running the computer searches, he observed Williams make a call in her vehicle

from a cellular phone. Shortly thereafter, a GMC Suburban with tinted windows pulled up behind Officer Jones's patrol car. The Suburban stopped one to one-half car lengths behind the officer's vehicle, and the driver left the headlights on. According to Jones, because of the headlights and the time of night, he could not see into the Suburban. Therefore, he could not determine how many people were in the vehicle. Jones testified that the Suburban's presence alarmed him, and that he feared an ambush. He also testified that in his eight years experience, no other car had pulled up directly behind him during a traffic stop. As a result, Jones radioed for backup. A second officer, Sergeant Rodarte, arrived within two to five minutes.

The defendant, Terry Smith, was the driver of the Suburban. When Rodarte arrived, Rodarte and Jones approached Smith with their guns drawn, and Rodarte yelled "forcefully and directly" at Smith to turn off the ignition and drop his keys out the window. Smith complied. During this exchange, two other officers arrived at the scene and approached Smith's vehicle.[1] Rodarte then yelled at Smith to exit the vehicle slowly keeping his hands in the air. Rodarte ordered Smith to turn around so that the officers could do a visual search for weapons. He then ordered Smith into a kneeling position with his hands behind his head. The officers commanded Smith to lie prone, handcuffed him, and took him into custody for

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[1] Sergeant Rodarte initially testified that he was not sure whether the other officers had their weapons drawn at this point, but Rodarte's testimony later indicated that at least one of the officers had a weapon drawn during this period.

the crime of interference with police authority, in violation of a Denver municipal ordinance. At that point, the officers reholstered their weapons. The officers stood Smith up, conducted a pat down search, and asked permission to search the Suburban, to which Smith consented. At no point after arriving at the scene did Smith make any movements or attempt to get out of the car until told to do so by the officers. Smith neither resisted the officers nor failed to comply with any of their commands.

The officers testified that they would have searched Smith's vehicle, even without his consent, under their search incident to arrest authority. The search of the Suburban revealed a loaded handgun in the center console and a substance that appeared to be crack cocaine in the overhead console.[2]

The State charged Smith with four counts: (1) possession with intent to distribute a controlled substance; (2) possession of a controlled substance schedule II; (3) possession of twenty-five grams or more of a controlled substance schedule II; and (4) special offender, controlled substance, deadly weapon.

Smith filed a motion to suppress. The trial court granted the motion finding that the officers' conduct amounted to an arrest without probable cause because there was no evidence that Smith had indeed interfered

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[2] The officers' written reports indicated that the center console had a small door, but that the door was open so that the handgun was in plain view to the officers. The overhead console was enclosed with a small door, which the officers opened to find the cocaine.

with the officers' conduct. In so holding, the court analyzed objective evidence of interference, not the subjective belief of Officer Jones. The court then examined whether the officers had conducted an investigatory stop, and concluded that they had not. The court found that the officers had used more force than was necessary under the totality of the circumstances, and that the use of such force converted the stop into an arrest. Because the officers arrested Smith without probable cause and searched his vehicle without his valid consent, the trial judge suppressed the evidence found in the Suburban.

The State then filed this interlocutory appeal challenging the trial judge's legal conclusion that this police-citizen encounter constituted an arrest.[3]

II.

We must first determine whether the police contact with Smith amounted to an arrest or an investigatory stop. We hold that under these circumstances, this police-citizen encounter is properly characterized as an investigatory stop despite the show of force and resulting seizure.

Whether an encounter is an arrest or an investigatory stop is a mixed question of law and fact. We defer to the trial court's findings of fact, but undertake de novo review of the trial court's legal conclusions. *See People v. Arroya*, 988 P.2d 1124, 1129 (Colo. 1999).

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[3] The State does not challenge the findings of fact made by the district court, and we accept these findings in full.

On the spectrum of police-citizen encounters, which range from a full-scale arrest or search to a consensual encounter, an investigatory stop falls in the middle. *See People v. Archuleta,* 980 P.2d 509, 512 (Colo. 1999). Because an investigatory stop is an "intermediate" level of police response, it may be employed in "narrowly defined circumstances upon less than probable cause." *Id.* The less exacting standard of "reasonable suspicion" applies, allowing officers to stop suspects and question them or to conduct a pat down for weapons. *See Terry v. Ohio,* 392 U.S. 1 (1968); *Stone v. People,* 174 Colo. 504, 485 P.2d 495 (1971).

Because roadside encounters between police and suspects are recognized as being especially hazardous, when police conduct an investigatory stop in the context of a traffic stop, an officer may order the driver or passengers out of the automobile and conduct a protective search of the passenger compartment of the vehicle for weapons as long as the officer possesses a reasonable belief that the occupants pose a danger. *See Michigan v. Long,* 463 U.S. 1032, 1049 (1982). "Such a limited intrusion is viewed as a reasonably effective method of neutralizing the risk of physical harm confronting the officer." *People v. Melgosa,* 753 P.2d 221, 225-26 (Colo. 1988).

Furthermore, during an investigatory stop, an officer may take steps to ensure his own safety. *See Archuleta,* 980 P.2d at 513. This means that an officer may take physical control of or seize a suspect. *See Long,* 463 U.S. at 1051. An officer may use force in detaining a suspect, and the fact that some force is used does not necessarily convert the police-citizen encounter into an arrest. *See People v. Breidenbach,* 875 P.2d 879, 887 (Colo. 1994). Even the use of

handcuffs does not automatically transform a detention into an arrest. *See People v. Bland*, 884 P.2d 312, 322 (Colo. 1994). Generally, "the trend developing since *Terry* has been to include within the rubric of investigatory stops in some circumstances 'the use of handcuffs, the placing of suspects in police cruisers, the drawing of weapons and other measures of force more traditionally associated with arrest than with investigatory detention.' " *Archuleta*, 980 P.2d at 513 (quoting *United States v. Tilmon*, 19 F.3d 1221, 1224-25 (7th Cir. 1994)).

In *Archuleta*, this court characterized a police-citizen encounter as an investigatory stop rather than an arrest when a police officer followed a fleeing suspect into a restaurant where the suspect was hiding, the officer drew his gun, and interrogated the suspect with his weapon still drawn. *See* 980 P.2d at 513. We held that the officer's use of his weapon did not constitute an arrest, but rather was a justifiable safety precaution under the circumstances. *See id.*

While we have found that physical restraint, the use of handcuffs, the drawing of weapons, and other demonstrations of force do not necessarily convert an investigatory stop into an arrest, such show of force does heighten our concern as to whether the action taken exceeds what is reasonably necessary. Moreover, the use of such force is a far greater level of intrusion. *See United States v. Melendez-Garcia*, 28 F.3d 1046, 1052 (10th Cir. 1994). The use of physical restraint, handcuffs, and weapons in the same stop is only justified when the circumstances indicate that such force constitutes a "reasonable precaution

for the protection and safety of the investigating officers." *See* 4 Wayne R. LaFave, *Search and Seizure* § 9.2(d) at 37 (3d ed. 1996).

In this case, it was reasonable for the officers to be suspicious about the motive and intent of the driver of the Suburban. The officer had discovered that Williams was driving a stolen vehicle; it was nearly 3:00 a.m. and no one else was present; Smith arrived after the suspect in the stolen vehicle placed a phone call; and the Suburban pulled directly behind Officer Jones and left the headlights illuminated such that Jones could not see into the Suburban. Under all of these circumstances, it was clearly reasonable for the officers to believe that the occupant(s) of the Suburban could pose a threat to their safety. Therefore, Officer Jones and the other officers were entitled to order Smith out of the car, and conduct a protective search for weapons.[4]

The degree of force that the officers used was significant, but was not disproportionate to the circumstances in which they found themselves. The officers' display of

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[4] While the unexpressed subjective feelings of the officers do not in themselves play any role in determining whether the incident constitutes a stop or an arrest, they may be relevant to the extent that they reflect on what the officers' demeanor, attitude, and actions may have been towards the suspects since these attributes would have mirrored the officers' state of mind and may have affected the suspect's perception of the extent of confinement. *See United States v. Richard*, 732 F.Supp. 656, 662 n. 4 (W.D. Va. 1990). Here, although the officers testified that they had a subjective intent at the time to arrest Smith, any effect their intent may have had is outweighed by the paramount concerns for officer safety under these facts.

weapons and means of detaining Smith were legitimate safety precautions taken in response to the uncertain danger posed by the Suburban's occupant(s). The officers were entitled to use some force until they secured the situation, were able to ascertain Smith's identity, whether he was armed, and the reasons for his presence at the scene. Accordingly, we hold that the trial court erred in determining that the officers' use of force transformed the stop into an arrest.

III.

Having concluded that the officers conducted an investigatory stop rather than an arrest, the court must determine whether that stop was constitutionally permissible. Although investigatory stops may be conducted upon less than probable cause, they are still subject to the reasonableness requirements of the Fourth Amendment. *See Archuleta,* 980 P.2d at 512. An investigatory stop meets constitutional standards if: (1) the officer conducting the stop has an articulable and specific basis in fact for suspecting that criminal activity has occurred, is taking place, or is about to take place; (2) the purpose of the detention is reasonable; and (3) the scope and character of the intrusion are reasonably related to its purpose. *See People v. Cagle,* 688 P.2d 718, 721 (Colo. 1984).

A.

Assessing whether the police had an "articulable and specific basis in fact" for suspecting that Smith could be involved in criminal activity requires an examination of the totality of the circumstances. *See People v. Sutherland,*

886 P.2d 681, 686 (Colo. 1994). In making this determination, police officers must have more than an "unparticularized suspicion or hunch" that criminal activity is afoot. *See People v. Rahming*, 795 P.2d 1338, 1341 (Colo.1990) (quoting *Terry*, 392 U.S. at 27). The inquiry is objective, considering the facts and circumstances known to the officer immediately prior to the stop. *See id.* Relevant circumstances include the lateness of the hour, the character of the area, the reaction to the presence of police, and whether a companion is being arrested. *See Hampe v. Tipton*, 899 P.2d 325, 328 (Colo. App. 1995).

In *Hampe*, the court of appeals found an adequate basis to suspect criminal activity and conduct a stop under circumstances similar to this one. *See id.* In that case, the defendant parked his car across from officers who were conducting a stop of another vehicle, and turned off his headlights, apparently to observe the police. The defendant then pulled his car directly across the street from the officers with his motor running and parking lights on. *See id.* at 327. The court of appeals found that in such circumstances the officers had a reasonable concern for their safety, and were justified in stopping the defendant to investigate his activities. *See id.* at 328. In fact, the court held that the evidence supported the conclusion that "any police officer who in these circumstances was not concerned with safety would be putting himself or herself in jeopardy and that a reasonable police officer would make a limited investigation to determine what was afoot." *Id.*

Given the totality of the circumstances known to the officers at the time they approached the Suburban, it was objectively reasonable for Officer Jones and the other

officers to infer that the driver of the Suburban was acting in concert with the driver of the stolen vehicle and intended to impede police authority. The officers had more than "an unparticularized hunch" that Smith may have been involved in some type of criminal activity, and accordingly had a sufficient articulable basis in fact to conduct the stop.

B.

Evaluating the second prong of the test, whether the purpose of the intrusion was reasonable, requires a two-step inquiry. The court must first determine the officer's actual purpose in making the stop and ancillary protective search. *Cagle*, 688 P.2d at 722. Here, the officers' purpose was to avoid ambush and question the driver of the Suburban in connection with the questioning and possible arrest of the driver of a stolen vehicle. In pursuit of that purpose, they confined Smith and searched his car.

Second, the court must determine whether this purpose was reasonable. *See id.* This means that the court should examine the objective circumstances surrounding the stop and search in order to arrive at its own factual determination of the officer's purpose; and "only then may the court conclude that the purpose was reasonable." *Id.*

As to the latter part of the inquiry, this court repeatedly has found a reasonable purpose in conducting an investigatory stop and protective search when the suspect made a furtive gesture in response to the initial police contact. *See People v. Jackson*, 948 P.2d 506, 508 (Colo. 1997)

(holding that a weapons search was reasonable when defendant pulled a coat over his lap in response to a police stop); *Melgosa*, 753 P.2d at 227 (finding a weapons search proper when a passenger placed an object under the seat); *Cagle*, 688 P.2d at 723 (holding a weapons search would be reasonable when a passenger leaned over in his seat after the officer activated overhead lights to signal an automobile to stop).

Similarly, in *Sutherland*, this court found an investigatory stop and weapons search to be reasonable when an officer had reason to be concerned with retaliatory actions from the companion of a suspect who was the focus of a stop. *See* 886 P.2d at 687. In that case, an officer followed a vehicle when he suspected the occupants of theft. *See id.* at 686. The driver stopped the vehicle and rapidly approached the officer on foot demanding to know why the officer was following his car, while the other suspects remained seated in the vehicle. *See id.* at 687. In order to ensure his personal safety, the officer stopped the driver, conducted a pat down search, and then separated him from the other suspects. *See id.* The court concluded that under the circumstances, the purpose of the intrusion on the driver was reasonably related to concerns for the officer's safety. *See id.*

In this case, the officers' testimony supports the conclusion that they stopped Smith to assure that he would not interfere with proceedings concerning the stolen vehicle and that they searched for weapons to secure their own safety. Officer Jones testified that he requested the assistance of other officers out of a concern for his safety. Officer Rodarte testified that his initial reaction on receiving Jones's radio call was that Jones faced a possible

ambush. Officer Rodarte also testified that his intent in searching Smith's vehicle was to search "incident to arrest and for officer safety purposes."

Evidence in the record also supports the conclusion that it was objectively reasonable for Officer Jones to conduct a search for weapons. Given the circumstances surrounding the arrival of Smith's Suburban at the scene of the traffic stop, a reasonable officer would have inferred that Smith was intending to interfere with police authority. A reasonable officer also would have recognized the potential danger in the situation and conducted a protective search in order to secure his safety.

C.

The third prong of the test, whether the officers used an amount of force that was reasonably related in scope and character to ensure their safety during the period of detention or whether the officers' use of force was excessive, is the pivotal inquiry in this case. *See Cagle*, 688 P.2d at 722.

The United States Supreme Court has long held that investigatory stops necessarily involve some degree of physical coercion, or threat thereof, in order to carry out the stop. *See Terry*, 392 U.S. at 22-27. Although the Supreme Court has not had the occasion to determine what degree of force is excessive in an investigative stop, the Court has outlined the analysis necessary to make that determination. *See Graham v. Conner*, 490 U.S. 386 (1989) (holding that a claim of excessive force during an investigatory stop should be analyzed under Fourth

Amendment principles rather than substantive due process principles). The Court stated that the nature and quality of the intrusion on the individual must be balanced against the government's interests. *See id.* at 396. This objective analysis takes into account all the circumstances of the case including "the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Id.* The Court specifically observed that this must be judged from a reasonable officer's perspective at the time of the stop, not with the advantage of hindsight. *See id.* The Court also noted, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Because of the concern for officer safety, especially in investigatory stops involving automobiles, the use of force to detain a suspect may be reasonable. *See Long*, 463 U.S. at 1051; *Breidenbach*, 875 P.2d at 887. Accordingly, this court has upheld the use of weapons during an investigatory stop. *See Archuleta*, 980 P.2d at 513 (finding a stop reasonable when the officer drew his weapon as he approached the suspect and interrogated him); *People v. Lewis*, 659 P.2d 676, 682 (Colo. 1983) (holding that the scope of a stop was reasonably related to its purpose when officers approached a suspect in a vehicle with their weapons drawn because they had been cautioned by other officers that the suspect may be armed).

Similarly, the use of handcuffs in an investigatory stop may be reasonable. *See People v. Bland,* 884 P.2d 312, 322 (Colo. 1994) (upholding the use of handcuffs during a noncustodial arrest when the officers had noticed a weapon nearby). Numerous courts in other jurisdictions similarly have upheld various means of physical restraint during investigative stops. *See* LaFave, *supra,* § 9.2(d) at 36-37 (noting that courts have sanctioned a wide variety of police actions to detain suspects in investigative stops including the drawing of weapons, seizing the suspect's car keys, deflating the suspect's tires, using handcuffs, laying the suspect on the ground, and surrounding the suspect with multiple officers).

Here, the officers used a reasonable amount of force in light of the situation. The officers were investigating a felony at nearly 3:00 a.m., and the initial suspect in the stop appeared to have reacted to the police by calling an associate. At the time of the stop, it was dark and the officers did not know how many people were in the Suburban. These facts justified the officers in using some force to take charge of the situation. Overall, the officers conducted themselves in a way that allowed them to avoid injury or death until they could confirm or dispel the suspicion that Smith was involved in criminal activity. Given the circumstances, the amount of force they used was not clearly unreasonable or excessive.

Therefore, we conclude that the officers' investigatory stop of Smith meets all three prongs of the test for reasonableness under the Fourth Amendment.

IV.

The final question for the court is whether the evidence discovered during the protective search of Smith's automobile may be admitted into evidence. When police conduct an investigatory stop during a traffic stop, they may search the passenger compartment of the vehicle for weapons if the officers reasonably believe that the occupants pose a safety risk. *See Long*, 463 U.S. at 1049. During a protective search, police may search all compartments where a weapon may be hidden. *See id.*

When an officer is constitutionally justified in conducting a protective search of an automobile for weapons, and other evidence of a crime is discovered, the plain view doctrine allows the officer lawfully to seize the object without a search warrant. *See Melgosa*, 753 P.2d at 226 (holding that stolen goods discovered during a protective search were admissible); *Lewis* 659 P.2d at 682 (upholding admission of drugs seized during a weapons search). "A plain view seizure involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity." *Melgosa*, 753 P.2d at 226 (quoting *Texas v. Brown*, 460 U.S. 730, 738 (1983)).

Here, the officers were entitled to search Smith's car for weapons because they justifiably believed that they were dealing with a potentially dangerous suspect. The fruits of that search, the loaded handgun and the cocaine, were properly discovered during the course of the protective search. Both items were in compartments large enough to contain a weapon or were in plain view, and

the officers had probable cause to associate both the gun and the drugs with criminal activity.

V.

In conclusion, we hold that given the totality of the circumstances facing the police, the amount of force used in detaining Smith was not patently unreasonable. The officers feared for their own safety, and the steps they took were dramatic, but not unreasonable. The police had reasonable grounds to suspect that Smith was involved in criminal activity; the stop had a valid purpose; and the scope of the stop was not excessive. Therefore, the stop satisfied the requirements of the Fourth Amendment.

Pursuant to the valid investigatory stop, the officers were entitled to conduct a protective search of the Suburban. The officers discovered the evidence in plain view, and the items should be admissible evidence. Accordingly, we reverse the trial court's suppression order, and return this case to that court for further proceedings.

Justice COATS does not participate.

DISTRICT COURT, CITY AND COUNTY OF DENVER
STATE OF COLORADO
Case No. 99-CR-1071, Courtroom 20

REPORTER'S TRANSCRIPT
(Filed Feb. 28, 2000)
Hearing on Motions
February 9, 2000

THE PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

v.

TERRY SMITH,

Defendant.

The hearing on motions in this matter commenced on Wednesday, February 2, 2000, before The HONORABLE ROBERT S. HYATT, Judge of the District Court.

This is a full and complete transcript of the proceedings had on this date in the aforementioned matter.

APPEARANCES

FOR THE PEOPLE: **Brian J. Allen, Esq.,**
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Assistant District Attorney

FOR THE DEFENDANT: **Frank I. Scheitler, Esq.**
Registration No. 15436

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[3] **PROCEEDINGS**

THE COURT: Okay.

MR. ALLEN: Your Honor, can we call No. 28?

THE COURT: It's another item on motions. Terry Smith, 99-CR-1071.

Mr. Scheitler appears for Mr. Smith. Mr. Smith also appears.

MR. SCHEITLER: Good afternoon, Your Honor.

THE COURT: And Mr. Allen appears for the People.

What's the status of this case?

MR. ALLEN: It's my understanding after talking with defense counsel that the case is going to go to motions today. The People have all their witnesses here. We're ready to go.

THE COURT: How many do you have?

MR. ALLEN: I have four witnesses here, but I think I can get by with three.

MR. SCHEITLER: Judge, we're ready to proceed.

THE COURT: Call your first witness. Nobody else is ready to go.

MR. ALLEN: Okay. This is – I would ask two things, Your Honor.

First witness I'm going to call is Officer Charles Jones, but I also ask that I be allowed to have an advisory witness in this case, who is Sergeant Joseph Rodarte.

THE COURT: All right.

[4] MR. ALLEN: And he's out in the hall. If I can get him?

MR. SCHEITLER: Judge, we ask for sequestration of all the witnesses.

THE COURT: Sequestration is in effect but for your designated advisory witnesses.

Sequestration is in effect. Witnesses are not allowed to remain in the courtroom, nor are they allowed to discuss their testimony with others. So all other witnesses are advised to leave the room and they're not allowed to discuss their testimony.

MR. ALLEN: Your Honor, People would call Officer Charles Jones.

CHARLES JONES,

Having been called as a witness on behalf of the People, being first duly sworn upon his oath, testified as follows:

THE COURT: Please have a seat.

DIRECT EXAMINATION

BY MR. ALLEN:

Q Good afternoon.

A Good afternoon.

Q Would you please state your full name, spelling both your first and last name for the court reporter.

A Charles Jones. C-h-a-r-l-e-s, J-o-n-e-s.

Q How are you employed, sir?

[5] A I'm a Denver police officer.

Q How long have you been a Denver police officer?

A For eight years.

Q What is your current assignment?

A I currently work as a patrol officer out in District 5.

Q And what part of Denver is District 5?

A The Montbello area.

Q Was that your assignment back on March 15 of 1999?

A Yes, it was.

Q Do you recall an incident that occurred at the approximate location I-70 and Peoria? The on ramp there to the – to the interstate that occurred about 2:50 a.m.?

A Yes, I do.

Q What I would like you to do at that time is – at this time is, tell the Court what you were doing at the time and how the episode actually started.

A Okay. I had observed a vehicle traveling northbound on Peoria Street with dangling objects. I proceeded to pull the vehicle over for a traffic violation.

Q What sort of a vehicle was this in terms of general description?

A It was a 1998 Jeep Cherokee.

Q Okay. And where did the vehicle pull over?

A The vehicle finally pulled over on the westbound ramp [6] on I-70 from Peoria.

Q Okay. And at approximately what time in the morning is this?

A This was approximately 2:50 a.m. in the morning.

Q What were the lighting conditions like at that particular location on the on ramp, if you recall?

A It's pretty much dark, but I think there's a light pole right there.

Q Now, were you – did you have a partner or were you working alone?

A No. I was working solo.

Q And what sort of a – of car were you driving? Was it a marked unit or unmarked unit?

A No. It was a marked police unit.

Q Okay. And when you pulled this Jeep Cherokee over, what did you do with your emergency equipment?

A I activated my emergency lights.

Q Okay. And with your emergency lights on, would that be visible to people traveling in either direction or just one direction?

A Either direction, you could see my lights on.

Q Okay. What did you do after you stopped the car?

A After I stopped the vehicle, I contacted the driver.

Q And who was the driver?

A The driver of the vehicle was a Natalie Williams.

[7] Q A female.

Was there anybody else in the car with her?

A No. She was in the vehicle by herself.

Q Okay. Describe your encounter with Ms. Williams.

A Well, I contacted her and asked for her driver's license, registration, and proof of insurance of the vehicle. I also asked who the vehicle belonged to. She told me it belonged to a friend.

Q Okay. Did she have a driver's license?

A Yes, she did.

Q And did she have any paperwork indicating the registration of the vehicle or ownership of the vehicle of any kind?

A No. She didn't have any paperwork in the vehicle.

Q She had no paperwork?

A No.

Q All right. So what did you do at that time?

A At that time, I went to my patrol unit and went to my computer and punched in the license plate number of the vehicle and I got no record found on the vehicle. So

then I went back up to the vehicle and got – wrote down the VIN number.

Q The VIN number?

A Right.

I went back to my patrol unit, put the VIN number in my computer, and it came back as a transfer – a Denver steal.

[8] Q Okay. What exactly do you mean by a Denver steal?

A It was a stolen vehicle out of Denver.

Q Okay. What did you do at that time?

A At that time, I advised the dispatcher that I had a traffic stop with a reported stealer.

Q At this point in time, had you been – when you were calling in this call, did you observe the driver, Ms. Williams, doing anything in particular?

A I observed her call somebody on a cell phone that she had in the vehicle.

Q Okay. While you were calling this in, then what happened?

A As I was calling in, another vehicle pulled in right behind me.

Q What sort of a vehicle was this second car that pulled in right behind you?

A Hold on a second.

(The witness referring to a document.)

A It was a GMC Suburban.

Q Okay. And describe, if you would, how this happened. I mean, your car is parked – I gather you're stopped behind the Jeep?

A Yes.

Q Your emergency lights are on. Describe the scene as this – as this Suburban and – and what happens when it – how [9] it pulls up.

A Okay. As I recall, I was calling it in. I'm sitting there. And also I see in my rear view mirror, a vehicle pull in right behind me. I didn't know what was going on, so I advised the dispatcher that I had a vehicle stopped on a traffic stop and that another vehicle had just pulled in behind me.

Q What were the – could you see the inside of the Suburban as it pulled in behind your patrol car?

A Actually, I couldn't see inside of it.

Q Why not?

A It was behind me. It was kind of dark out there, so I didn't – I couldn't actually see inside the vehicle from behind me.

Q Were the headlights of that vehicle on?

A Yes. The headlights was on.

Q Okay. What were you – what were you thinking when this car pulled up?

A Well, I heard of past situations where a lot of cops have been ambushed on traffic stops. So at that time, I

thought I was being ambushed, so I advised them to send me some cover cars.

Q How concerned were you for your own safety?

A I was very concerned.

Q So what did you do between the time you called for [10] cover to come to your assistance and before they arrived?

A I waited inside my unit until the cover cars came.

Q Okay. And did either the driver of the car that you had originally stopped, the Jeep, or anybody from the Suburban do – get out of the car or do anything while you were waiting?

A No. Everybody stayed inside the vehicles.

Q How long? Do you recall how long it took before someone arrived to assist you?

A Anywhere between two to five minutes.

THE COURT: Hang on for a moment before you ask your next question.

(Interruption in the proceedings.)

THE COURT: Okay. Go ahead.

Q (By Mr. Allen) How – how close to your car did this Suburban come if you know?

A Anywhere from half a car length to a full car length.

Q Now, in your – is it eight years as a police officer?

A Yes, sir.

Q Can you recall how many times in that time that you've had a similar experience where you've stopped somebody at the roadside in the early hours of the morning and somebody has pulled in behind you?

A Actually, this is the first time. Most the times when people pull in to assist with their friends or their traffic stop, they usually pull in front of their vehicle.

[11] Q Okay. Who was the – who arrived to assist you?

A The first car at the scene was Sergeant Rodarte.

Q And what do you recall happening when Sergeant Rodarte arrived?

A As soon as he arrived, we proceeded to bring the driver out and put him in a kneeling position.

Q Okay. Can you be a little more specific. How did you do that?

A We did it by gunpoint.

Q Okay. Why?

A For officer safety.

Q Now, you've already testified that this is the first time that somebody has pulled in behind you when you had somebody stopped by the roadside. I'm going to ask you to take a look at something here in just a second.

But is [sic] a police officer, in addition to the laws and the statutes of the State of Colorado, are you also charged with enforcing the municipal ordinances of the City of Denver?

A Yes, I am.

Q I'm going to be showing you what's been marked as People's Exhibit – I was going to show you People's Exhibit No. 1, but I've actually highlighted this one. I have another one that's not highlighted. I'm sorry, Your Honor.

THE COURT: Go ahead and use the one you've highlighted. I'll ignore the highlighted portions or ignore [12] the fact that it is highlighted.

Q (By Mr. Allen) Would you take a look at that.

(Mr. Allen handing People's Exhibit No. 1 to the witness.)

MR. SCHEITLER: Your Honor, if I could see it. I haven't seen it prior to the witness looking at it.

THE COURT: Help yourself.

MR. ALLEN: I apologize.

MR. SCHEITLER: Thank you.

(Mr. Scheitler reviewing People's Exhibit No. 1.)

MR. SCHEITLER: Thanks, Judge.

Q (By Mr. Allen) Do you recognize that?

A Yes, I do.

Q What is it?

A It's Municipal Code Section 38-31.

Q And what is that municipal code?

A Interference with police authority.

Q All right. And I'd like to ask you a couple questions.

When –

THE COURT: What's the cite on that ordinance? I'm sorry.

THE WITNESS: It's 38-31.

THE COURT: 38-31?

THE WITNESS: Yes, it is.

[13] Q (By Mr. Allen) If I might have the exhibit back.

When he pulled in behind you – when this Suburban pulled in behind you, how did that – what did – what effect did that have on your investigation of the – of the theft or the stolen car that you were currently investigating? What did it do to it?

A It took my attention away from the vehicle that was in front of me.

Q Okay. What did it do with respect to involving other officers?

A I don't understand your question.

Q In other words, if – if you had – if he had not pulled in behind, how many officers would you have requested for cover?

A Probably one more.

Q Okay. And how many officers ultimately needed to respond to this situation?

A There was approximately three other officers that came.

Q Did it have any effect on the length of time that you ended up ultimately spending on the – the – your investigation of the auto theft?

A Yes. It did.

MR. ALLEN: Your Honor, I would ask that People's 1 be admitted.

[14] THE COURT: Any objection?

MR. SCHEITLER: No, Your Honor.

THE COURT: One is admitted.

Q (By Mr. Allen) Now, after – after Officer Rodarte arrived and the driver was gotten out of his Suburban, did – were any other parties identified being in the Suburban or was there only one person?

A At that time, I could only see – there was only one person in the vehicle.

Q And did you personally get a look at that person?

A Yes, I did.

Q Do you see that individual here today that was the driver of the Suburban that pulled in behind you?

A Yes, I do. He's sitting at the defendant's table wearing a blue striped shirt and khakis.

THE COURT: The record will reflect the witness has identified the defendant.

MR. ALLEN: If I might have just a moment, Your Honor?

THE COURT: Sure.

(Interruption in the proceedings.)

Q (By Mr. Allen) And based on your training and experience, Officer Jones, did – did the defendant, Mr. Smith, when he pulled in behind you and the events that followed from that, did he interfere with your investigation?

A Yes, he did.

[15] MR. ALLEN: I have no further questions of this witness at this time, Your Honor.

THE COURT: Cross-examination.

MR. SCHEITLER: Thanks, Judge.

CROSS-EXAMINATION

BY MR. SCHEITLER:

Q Good afternoon, Officer.

A Good afternoon.

Q Now, would I be correct in stating that the original contact that you had with Ms. Williams was not an – initially a felony stop; isn't that correct?

A No. It wasn't. At first, it was just a normal traffic stop.

Q You stopped her because she had an obstructed – obstructed windshield; is that correct?

A Yes, sir.

Q And that's because she had things hanging from her rear view mirror?

A Yes, sir.

Q Now, when you contacted Ms. Williams, you subsequently found out that the car she was driving was stolen?

A Correct.

Q At no time during the course of that investigation, did you determine that Mr. Smith was involved with that stolen vehicle?

[16] A What do you mean?

Q (Mr. Scheitler shrugs.)

A When I found out the vehicle was stolen and called my dispatcher and advised her that I had a stolen car, and that's when Mr. Smith drove in behind me.

Q Okay. My question to you is, at no time did you make a determination that Mr. Smith was involved with the steal of that car?

A No, I didn't.

Q Okay. Now, Mr. Smith pulled in behind you. And you testified that – that he was a car length to half car length behind you?

A That's approximately, yes.

Q And you had the lights on?

A Yes, sir.

Q The takedown lights and everything going?

A Well, I had my emergency lights and my spotlight on her.

Q And your emergency lights point to the front and the back of the car –

A Yes, sir.

Q – is that correct?

Okay. So he pulls in behind you. And for want of a better phrase, you get scared; isn't that correct?

A Pretty much.

[17] Q Okay. So at that time, you call for backup, correct?

A Correct.

Q Okay. So you go back and you sit in your car, correct?

A I was already sitting in my car when he pulled up behind me.

Q So you didn't get back out of your car?

A No, sir.

Q You remained in your car?

A Yes, sir.

THE COURT: Mr. Scheitler, would you hold that thought for a moment.

(Interruption in the proceedings)

THE COURT: Mr. Scheitler, go ahead.

MR SCHEITLER: Thank you, Your Honor.

Q (By Mr. Scheitler) Backing up a little bit, Officer. I'm a little confused.

When you first made the traffic stop on the Jeep Cherokee, you got out and went to the window. You identified Ms. Williams. You got the information on the car. Did you go back to your police unit and then call it in at that point?

A Okay. What I did was, I pulled her over, contacted her, got all her information, came back to my computer, put the license plate number in the computer, found – no record found in the computer. Went back up to the vehicle, got a copy of [18] the – got the VIN number off the vehicle, went back to my car. Then I found out the vehicle was stolen. That's when I called it in to my dispatcher.

Q Okay. And at that time was when Mr. Smith pulled up right behind you; is that correct?

A Yes, sir.

Q Okay. Now, you made the call in to dispatch approximately 2:50 a.m. on that date in question; is that correct?

A I guess so.

Q Okay. Now, you testified that when you made the call in to dispatch, you found out it was a stolen vehicle? At that time, you requested backup; isn't that correct?

A I called the dispatch and let them know that I had the vehicle stopped and it was a reported steal. And then

Mr. Smith pulled in behind me and then I called for a cover car.

Q Okay. And Officer Rodarte, your testimony was –

A Sergeant Rodarte, yes.

Q Excuse me.

Sergeant Rodarte covered approximately three to five minutes afterwards; isn't that correct?

A Yes, sir.

Q Isn't it more accurate that Sergeant Rodarte covered approximately eight months – eight minutes later at 2:58 a.m.?

[19] A That's all approximately.

Q And during that eight-minute period of time, is it your testimony on cross-examination that you sat in your police unit?

A Yes, sir.

Q At no time during that eight-minute period of time, did you observe my client, Mr. Smith, committing any traffic violation or any other violation of law; isn't that correct?

A Except for the fact that he was parked right behind me.

THE COURT: Except for the fact that what?

THE WITNESS: That he was parked right behind me. That was it.

Q (By Mr. Scheitler) So that's all? He just pulled in behind you?

A Yes, sir.

Q You didn't see Mr. Smith reach for a gun, try to get out of the vehicle, do any of that; isn't that correct?

A No sir.

Q And same with Ms. Williams. Ms. Williams didn't get out of the car. You didn't see her rummaging around in the car trying to find anything. You testified that she talked on her cell phone and that was it; is that correct?

A Yes, sir.

Q Now, when Officer Rodarte – or excuse me, [20] Sergeant Rodarte covered you, how many other cars appeared at that time?

A What do you mean?

Q How many other cars covered? Was it just Sergeant Rodarte?

A Just Sergeant Rodarte first.

Q And who was in his unit? Anybody else?

A He was by himself.

Q Okay. What happens exactly when he appeared?

A At the time he arrived, we both got out of our vehicles, drew our guns, and ordered Mr. Smith out of the vehicle.

Q Now, did Sergeant Rodarte have his emergency equipment on at the time when he arrived?

A I can't remember.

Q So you pulled your gun, you got out of your unit, and what did you do? Did you go to the passenger door or did you go to the driver's side door? What did you do?

A As I – I got out of my vehicle and we both catercornered his vehicle so that way I could keep one eye on his vehicle and the other eye on her vehicle.

Q Okay. So where were you at precisely?

A Right outside my car door.

Q Okay. Just stood outside your car door?

A Right.

[21] Q You had your gun drawn. What, if anything, did you say to Mr. Smith?

A We ordered him out of the vehicle.

Q Okay. And what did Mr. Smith do in response?

A He got out of the vehicle.

Q And – okay. And where was Sergeant Rodarte at the time these orders were being given?

A At the rear of Mr. Smith's vehicle.

Q Is it true that he first ordered Mr. Smith to drop the keys out the window of the car and he did that and then you ordered him out of the vehicle?

A Say that again.

Q You first ordered Mr. Smith to remove the keys from the ignition and drop it out the window of the car?

A No, I didn't.

Q Did Officer Rodarte order him to do that?

A If he did, I don't remember.

Q Now, when Mr. Smith exited the vehicle, you didn't observe him in possession of a weapon at that time, did you?

A No, I didn't.

Q Okay. And when he exited the vehicle, you ordered him to the ground in a kneeling position and both you and Sergeant Rodarte had your guns pointed at Mr. Smith; isn't that correct?

A Yes.

Q And he also ordered Mr. Smith to put his hands behind [22] his head?

A Yes.

Q What, if anything, happened subsequent to Mr. Smith being placed on the ground with his hands behind his head? What did you do?

A I just maintained eye contact with Mr. Smith.

Q What, if anything, did you say to Mr. Smith?

A I don't remember what I said to him.

Q Did you say anything to him?

A I don't remember if I did say anything to him.

Q What happened next, Officer?

A Then he was – then he was handcuffed for officer safety.

Q Who handcuffed him?

(The witness referring to the report.)

A I don't remember.

Q So you didn't handcuff him?

A I don't think I did. I can't recall though.

Q What was Mrs. – Ms. Williams doing while all this was going on?

A She was still sitting inside her vehicle.

Q Now, at the time Mr. Smith was handcuffed, how many other officers had arrived on the scene, if any?

A After he was handcuffed, I think maybe one other car pulled in behind Sergeant Rodarte's vehicle. And then at that [23] time, I turned my attention to Mrs. Williams.

Q I'm correct in saying, am I not, that the officers that exited the other vehicle also drew their weapons and placed them on Mr. Smith?

A I don't remember.

MR. SCHEITLER: If I may have a moment, Your Honor?

THE COURT: Sure.

(Mr. Scheitler reviewing his file.)

Q (By Mr. Scheitler) I'd be correct in stating, would I not, Officer, that at no time you interrogated Mr. Smith?

A No. I never questioned him.

Q At no time did you search Mr. Smith or his vehicle?

A No, I didn't.

Q So it's your testimony this afternoon, Officer, that for approximately eight minutes, you sat in your vehicle because you were afraid of being ambushed, with your back to Mr. Smith?

A Correct.

MR. SCHEITLER: Thank you. I have no further questions of this witness, Your Honor.

THE COURT: Any redirect?

MR. ALLEN: Just Briefly, Your Honor.

REDIRECT EXAMINATION

BY MR. ALLEN:

Q Officer, you were asked questions by defense counsel [24] about whether or not you could see Mr. Smith doing anything when he came up on the scene. Could you see inside the Suburban at all?

A No. I couldn't.

Q Okay. So you had no opportunity to observe what he was doing inside the car?

A Correct.

Q All right. And what particular tactical problems does it pose to you as a solo police officer to be stuck in the middle between two cars?

A It's a very unsafe position.

Q Okay. Because?

A Because I've got to keep my eye contact with the vehicle in front of me as well as the vehicle behind me.

Q Is that what you did during the time that you were waiting for cover?

A Yes, sir.

MR. ALLEN: Nothing further, Your Honor.

THE COURT: Unless there's anything else, the witness may step down. Anything else?

MR. SCHEITLER: I have nothing further.

THE COURT: Okay. The witness may step down.

(Interruption in the proceedings.)

THE COURT: Okay. Call your next witness.

MR. ALLEN: Your Honor, the People would call for [25] their next witness, the second witness, Sergeant Joseph Rodarte.

THE COURT: Please raise your right hand.

JOSEPH RODARTE,

having been called as a witness on behalf of the People, being first duly sworn upon his oath, testified as follows:

THE COURT: Please have a seat.

Go ahead.

DIRECT EXAMINATION

BY MR. ALLEN:

Q Good afternoon.

A Good afternoon.

Q Would you please state your full name, spelling both your first and last name for the court reporter.

A Sergeant Joseph Rodarte. J-o-s-e-p-h, R-o-d-a-r-t-e.

Q How are you employed, sir?

A I'm employed as a sergeant with the Denver police department.

Q How long have you been a police officer?

A Ten years.

Q How long have you been a sergeant?

A For two.

Q Where – where are you currently assigned?

A District 5.

Q And were you assigned to District 5 back on March 15 [26] of 1999.

A Yes, I was.

Q Were you on duty at – at approximately 2:50 a.m. on the morning of March 15 of last year, 1999?

A Yes, I was.

Q Do you recall an incident that occurred at the on ramp to I-70 from Peoria at approximately 2:50 in the morning?

A Yes, I do.

Q Would you please tell us what your duties were that night before you actually got involved with the call.

A As a sergeant, I'm responsible for overseeing the detail. On this particular evening, I was the acting lieutenant, so I was in charge of the entire district for that shift. I conducted roll call, distributed subpoenas to officers, signed off on arrests and reports, log sheets.

Q Where were you when you learned that Officer Jones needed help?

A I was at the District 5 substation which is about 47th and Peoria.

Q The District 5 substation is –

A Yes, sir.

Q – at 47th and Peoria?

A Yes, sir.

Q Approximately how far is that from the location where the incident occurred?

[27] A It's approximately four blocks.

Q How did you become notified that Officer Jones needed help?

A Through the police radio.

Q Okay. And what information do you recall getting on that call?

A I recall Officer Jones coming over the radio and relating that he had a traffic stop that came back stolen and subsequently, another vehicle had pulled up directly behind him. And at that point, he called for a cover car.

Q Okay. Now, what did that mean to you?

A To me, that meant there was an ambush about to occur on one of my officers.

Q So what do you do?

A I sped out of the station, lights and sirens on, to cover my officer.

Q And approximately how long did it take you to get from the substation to the location?

A Approximately one minute.

Q What could you see as you approached the scene?

THE COURT: Before we get to that, the approach of the scene, hang on for just a moment.

(Interruption in the proceedings)

THE COURT: Thank you. Go ahead.

Q (By Mr. Allen) Describe what you saw as you – as [28] you approached the scene in your police car.

A I could see the suspect vehicle stopped, the original suspect vehicle, which was a silver Jeep Cherokee, Officer Jones parked directly behind the vehicle, and a new GMC Suburban parked behind Officer Jones.

Q When you say "new," what do you mean by that?

A It looked as if it was a brand new vehicle or inside of two years.

Q What did you do as you approached? Just take us through step by step.

A Well, I had to rotate to my left as I got out of my patrol car, as I had the intent to order the driver out at gunpoint and place him on the ground in a prone position. However, the situation was complicated by the fact that we had a crossfire situation both – two different ways. First of all, Mr. Smith was behind Officer Jones. Officer Jones was in between two possible hostile suspects.

In addition, where I had the position on my vehicle, I'm now behind Mr. Smith. And Officer Jones and I now, if gunfire does end up erupting, we have the possibility of striking each other. So I had to rotate to my left and order him out of the vehicle.

Q All right. And when you rotate – when you say rotate to your left, I gather, you're now out of the car on foot?

A Yes sir.

[29] Q Describe to us exactly where you went and how you tried to position yourself relative to where the Suburban was.

A I would be on the rear of the Suburban and to the left of the driver's side of the Suburban out in traffic.

Q So you're actually standing in the road – in the ramp way?

A Yes. Partially out in traffic, yes.

Q So describe what you did once you got there. You had your weapon drawn. What did you do?

A I ordered Mr. Smith to throw his keys out the window.

Q How did you order that?

A Very forcefully and directly.

Q And what did Mr. Smith do?

A He complied.

Q Okay. So you ordered him to drop the keys out?

A That's correct.

Q And – and then describe – take us through what you did to get him out of the car.

A Well, once he – he complied with the order to throw the keys out of the window. At that point, I stopped and waited for covering officers to arrive. Once they did arrive, that's when we ordered him out of the vehicle into a kneeling position.

Q Okay. Do you recall what – who arrived on the scene next?

[30] A I'm not certain who arrived next, but they were – they were within close proximity of one another. They were Officer Chambers and Officer Bruce.

Q Once the additional officers had arrived, you ordered him out of the car. Describe – describe that for the Court, please.

A We had – I told the suspect I wanted him to keep his hands in sight. And Mr. Smith was totally compliant. He followed all orders and did so in a pretty reasonable manner.

Q Okay.

A Fast manner.

Q And so how did – I mean, how do you get him out of the car?

A I have him open the car door with his right hand so we could still see both hands out of the vehicle and to slowly – keep his hands in the air as he exits the vehicle. Close the door behind him.

I had him rotate one full circle so I could do a visible check of his waistband area in order to look for any possible weapons. And then have him down on the ground at gunpoint facing away from me.

Q Approximately how far –

A Cross his ankles and keep his hands on the top of his head.

Q Approximately how far away from Mr. Smith are you at [31] this point in time?

A I'm about a half a car length to a car length.

Q Still standing in the roadway?

A Yes, sir.

Q Okay. Then what do you do – then what do you have your cover officers do?

A I have a cover officer go up to the Suburban, Mr. Smith's vehicle, the suspect vehicle, and visually inspect inside the vehicle to make sure there are no other suspects inside the vehicle.

And then at that point, my officer comes back. And then I have another officer go up, holster her weapon, which is Officer Chambers, and take the suspect into custody from a prone position at this point, lying flat on the ground.

Q Okay. And when you say take into custody, you mean put in handcuffs?

A Yes, sir.

Q Okay. Describe after he's handcuffed, then what do you do with him? And what do you do with your gun? Just tell us.

A I reholster my weapon as do the other officers. Ask him if he has any drugs or weapons either on his person or in his vehicle; which, he stated he did not. I asked him if I could check his vehicle. He said yes.

Q Okay. If he had said no, would you have still checked [32] his vehicle?

A Yes, sir.

Q Why?

A Incident to arrest and for officer safety purposes for his interference in the auto theft arrest.

Q Okay. So after he consented to the check of the search of the car, what was – what was the sequence of events then as you recall?

A I began to search the vehicle from the front driver's side door. And Officer Bruce began to search the vehicle from the passenger side rear door. Officer Bruce then recovered a weapon, a handgun, from the center console in the rear compartment.

Q Okay. Now, this is – this is a late-model Suburban with a center console. And you say in the – from the rear compartment of the center console. How does that relate to someone sitting in the – in the driver's side?

A From the driver's seat, the – this console would be immediately to the right in between the front driver's seat, and the front passenger seat within reach. You could reach any compartment of the console from the driver's seat.

Q Okay. And were you present when Officer Bruce physically located the handgun?

A Yes, I was.

Q Okay. What did he do with the gun?

[33] A He showed me the weapon and gave it to me. At that point, I made the weapon safe by pulling the magazine out with the ammunition and racking the slide of the weapon to the rear; at which point, the rounds came out of the chambers. So the weapon was ready to go.

Q Okay. So when – when you were – made the weapon safe, you were able to determine whether or not there was a bullet in the chamber?

A Yes.

Q And your determination was?

A There was.

Q Okay. Did you continue to search the car after the gun was found? After the semiautomatic handgun was found?

A Yes, sir.

Q And did you find anything?

A Yes, sir.

Q What did you find?

A I found a baggie of suspected crack cocaine.

Q And where did you locate that baggie of suspected crack cocaine?

A In the front area of the vehicle. There's a compartment on the roof of the vehicle. It's usually used to hold maps, documents, that type of thing.

Q And when you say it's on the – on the roof, can you describe exactly – I mean, it's clearly not on the outside of [34] the vehicle. What do you mean?

A It's on the interior of the vehicle. There are compartments. There's map lights, space for sunglasses, a compartment for a garage door opener, and another compartment for documents.

Q And – and where in that overhead console did you find the cocaine?

A I can't recall for sure, but I believe it was in the documents portion of the vehicle. It was either there or

the sunglass compartment, but it was one of those two anyway.

Q Now, other than the – do you recall any other conversation other than what you've already told us about between you and – and Mr. Smith after you got him out of the car?

A Yes, sir.

After he gave me permission to search his vehicle, he had said something about the – something to the effect that he didn't know the car was stolen. So I assume that that was referring to the vehicle Officer Jones had stopped initially.

Q Any other statements that you recall?

A No, sir.

Q Did you personally search Mr. Smith?

A No, sir.

Q Okay. Now, I'm going to ask you if you see the individual that was – that you got out of the car at gunpoint [35] on March the 15th of 1999, here in court today.

A Yes, I do, sir. Mr. Smith is seated at the defense table in the blue and white striped shirt.

MR. ALLEN: The record should reflect the witness has identified the defendant.

THE COURT: The record will so reflect.

MR. ALLEN: I have no further questions at this time, Your Honor.

THE COURT: Cross-examination.

Before you get started, Mr. Scheitler, let me just call one other case real quick.

(Interruption in the proceedings.)

THE COURT: Okay. All right. Where were we?

Cross-examination. Mr. Scheitler.

MR. SCHEITLER: Thank you, Your Honor.

CROSS-EXAMINATION

BY MR. SCHEITLER:

Q Good afternoon, Sergeant.

A Good afternoon, sir.

Q You were present during the direct and cross-examination of Officer Jones, were you not?

A Yes, sir.

Q Okay. And you recall Officer Jones testifying to the fact that he's had other traffic stops before when people have stopped to assist their friends when they've been stopped for [36] traffic tickets; isn't that correct?

A Yes, sir.

Q Okay. And he said this was different because my client pulled up behind him instead of in front of him and in front of the other car; is that correct?

A Yes. That's what he testified to.

Q Now, it wouldn't be your testimony today that based on how my client pulled up behind Officer Jones,

that Officer Jones couldn't just pull his car in front of my client or in front of the original stop or behind my client's car?

A Can you rephrase that. I'm sorry.

Q There was nothing - nothing - you have to excuse me. I've got the flu. I'm sorry.

A Yes, sir.

Q There's nothing that you observed when you arrived at the scene that would have prohibited Officer Jones from pulling his police vehicle out of the position it was in?

A That would have been an unsafe maneuver.

Q That's not my question, Sergeant.

He could have pulled out if he wanted to; isn't that correct? There was enough room?

A If he would have, I would have been all over him for officer safety hazard.

Q "Yes" or "no." He could have pulled his car out of that position, Officer?

[37] A If he were stupid, yes.

Q You know - I am correct in stating, am I not, Sergeant, that Mr. - or excuse me, that Officer Jones could have directed Mr. Smith to either back his car up or pull around the front side of the Jeep that he stopped. Nothing prohibiting him from doing that?

A The fact that he could have been shot, I think prohibited either of those moves.

Q Okay.

MR. ALLEN: Your Honor, I am going to object at this point. This is calling for a lot of speculation.

THE COURT: Overruled.

MR. ALLEN: Okay.

MR. SCHEITLER: Thank you, Your Honor.

Q (By Mr. Scheitler) The fact of the matter is, he could have asked my client to back his car up or pull his car around the front side of the Jeep Cherokee. "Yes" or "no."

A He could have, yes.

Q Now, when you arrived on the scene it was approximately 2:58 a.m., correct?

A Yes, sir.

Q So it took you about – if the dispatch went out approximately 2:57, it took approximately a minute to get over to the scene, correct?

A Yes, sir.

[38] Q You pulled in directly behind Mr. Smith's GMC Suburban; isn't that correct?

A A little bit offset to the left, yes.

Q And when you pulled in behind him, you testified that you had your lights and sirens on, correct?

A Yes, sir. And takedown lights.

Q Correct.

And when you pulled up, am – I'm correct in stating, am I not, that at no time did you observe Mr. Smith attempt to exit the vehicle prior to you directing him to do so?

A That's correct, sir.

Q And at no time did you observe Mr. Smith make any movement whatsoever in regard to throwing anything out of the cab of the truck where he was sitting based upon your observation?

A I could not see. The windows were tinted.

THE COURT: Before you ask your next question. I'm sorry.

(Interruption in the proceedings.)

THE COURT: Go ahead.

Q (By Mr. Scheitler) Now, Officer Jones testified on cross-examination – I believe on direct examination that he couldn't really see into the car even though he testified it was under a light and he had all his lights on. But the fact of the matter is, Officer Jones could see into the car because [39] he told you that he – that he could only see one individual inside the Suburban; isn't that correct?

A Sir, he had a high-profile vehicle with the headlights on. He testified or he related to me on the scene that he could only see one person and one person in the vehicle. It doesn't mean for sure that he had a clear view inside that vehicle.

Q Now, you filled out a report as it relates to this incident, isn't that correct –

A Yes, sir.

Q – Sergeant?

And you did that on the 15th at approximately 4:20 a.m., correct?

A Yes, sir.

Q Okay. And in that report, you note, "I ordered the suspect in a kneeling position near the rear driver's side door, Officer – as Officer Jones yelled to me that he could see only one individual inside the Suburban." Meaning the driver; isn't that correct?

A That's correct.

Q Okay. So he could see into the Suburban?

A He could see partially in there. I didn't take that as gospel truth in other words, sir.

Q So you pull up – you're yelling and screaming at Mr. – Mr. Smith in a forceful voice to throw the keys outside [40] the window of the car, correct?

A Yes, sir.

Q You got your gun drawn?

A Yes, sir.

Q What kind of gun do you have?

A Smith & Wesson .45.

Q And that's semiautomatic?

A Yes, sir.

Q And Officer Jones has got his gun drawn? That's what he testified?

A I can't recall for sure. I think he did.

Q Okay. What kind of gun does he have? Do you know?

MR. ALLEN: Objection, Your Honor. Relevance.

THE COURT: As far as – go ahead.

MR. SCHEITLER: Judge, if Officer Jones is so concerned that he's going to be ambushed, I'm real surprised that he didn't get out with his shotgun instead of just using his handgun and sitting in the car for eight minutes. I think this line of questioning is relevant, Your Honor.

MR. ALLEN: Well, I would again object, Your Honor, in terms of the type of gun that he was personally carrying. He could have asked Officer Jones when Officer Jones was on the stand.

THE COURT: Yeah. A gun is a gun as far as what he was carrying. If you want to ask about the shotgun, that's [41] fine.

Objection sustained.

Q (By Mr. Scheitler) Did he have his handgun drawn or did he have the shotgun?

A Handgun, I believe.

Q Okay. Thank you.

Now, I'm correct in stating, am I not, that the next officer to arrive on the scene was Officer Chambers. And she arrived at approximately 3:00 a.m.; is that correct?

A I believe she was the next officer to arrive. I'm not sure whether it was her or Officer Bruce.

Q And then Officer Bruce arrived at approximately 3:05?

THE COURT: Excuse me. Chambers arrived about 2:55? But you testified she arrived right after you.

THE WITNESS: Yes.

Q (By Mr. Scheitler) And then Officer Bruce arrived shortly thereafter?

A I'm not certain who arrived first, but they were in close proximity.

Q And they were in two separate patrol cars?

A Yes, sir. Every one was a solo assignment.

Q And did they have their lights and sirens on?

A I believe they did.

Q Now, when they exited their vehicles, I'm assuming they had their handguns drawn also; is that correct?

[42] A I didn't have my attention on them. I couldn't testify for sure. They should have.

Q Now, getting back to the – to the way you were handling Mr. Smith at the time that you arrived. You ordered that he throw the keys outside the window of the car and he complied.

A Yes, sir.

Q And then you ordered him out of the car with his hands in front of him; is that correct?

A Yes, sir.

Q And he complied?

A Yes, sir.

Q Okay. And you testified that you got into a position such that you could observe him to make sure he didn't have any weapon in his waistband or about his person; is that correct?

A Yes, sir.

Q And you observed no weapon at that time?

A Not that I could see unless it was underneath clothing.

Q And at no time during this process did Mr. Smith make any movements or attempt to avail himself of any weapon?

A No, sir.

Q So when he got out of the car, you remember yelling and screaming at him to go to his knees; is that correct?

A Yes, sir.

[43] Q And are the other officers –

A Well, not immediately. I had him turn around.

Q Turn towards you?

A Turn around in a circle towards the vehicle so I could visually inspect his waistband, both front and back, before he went to kneeling.

Q And I'm assuming, based on your testimony, you observed no weapons?

A Correct.

Q And Mr. Smith was compliant with your demands; isn't that correct?

A Yes, sir.

Q Now, you weren't the only officer that was telling him to get to his knees and put his hands behind his head, were you? The other officers were shouting commands at Mr. Smith also, were they not?

A I believe I was the only one yelling commands at him, sir.

Q Now, upon Mr. Smith complying with your demands, you said he had his hands behind his head. He was kneeling. It was 3 o'clock in the morning. He was on the off ramp of the Peoria Street exit. He was at that point handcuffed; isn't that correct?

A After – after he did this – those tactics, yes.

Q Now, I'd be correct in stating, would I not, Sergeant, [44] that at no point or at no time during the course of this episode, did you observe Mr. Smith commit any type of crime?

A That would be incorrect, sir.

Q Did you see him commit a traffic offense?

A I saw him commit an interference.

Q And I'm assuming your testimony is based upon the fact that he pulled up behind Officer Jones' car; is that correct?

A Yes, sir.

Q Okay. So that's the basis of – of your opinion that he committed a crime; that he was interfering somehow with Officer Jones?

A Yes, sir.

Q Okay. I would be correct in stating, would I not, that Officer Jones testified that at no time did Mr. Smith attempt to get out of his vehicle or contact the officer in any manner; isn't that correct?

A That's correct, sir.

Q So we're past that.

Besides the interference, I'd be correct in stating, would I not, that at no point did you observe my client prior to searching his vehicle, commit any type of crime whether it be state, county, municipal, federal?

A Other than the interference, yes, sir.

Q Yes. Other than that.

So you've got him kneeling out there. You've got your [45] gun on him. He's handcuffed. And at this point, you say, you don't mind if we search your car; isn't that correct?

A After we'd taken him into custody and we'd holstered our weapons, yes, sir.

Q After you take him into custody. What – and what did you take him into custody for?

A Interference and for officer safety.

Q And did you put that anywhere in your report?

MR. SCHEITLER: If I may approach, Your Honor?

THE COURT: You may.

MR. ALLEN: I – just for clarification.

MR. SCHEITLER: That he was taken into custody for interference.

MR. ALLEN: Okay.

THE COURT: Go ahead.

Q (By Mr. Scheitler) Would your report help refresh your recollection?

A Yes, sir.

Q I'm handling you what has – handing you what's been marked as Defendant's Exhibit A. Can you take a look at that document and tell me whether or not you recognize it.

(The witness reading.)

Q Is that your report, Officer – or excuse me, Sergeant?

A At the bottom it states – says it doesn't contain all [46] the details and facts of the episode. I did not note that in my writing.

Yes, sir. You would be correct.

Q The fact of the matter is, you noted in your report that after my client had been handcuffed, you asked Officer Chambers to conduct a pat-down search of Mr. Smith and simultaneously asked him if he had any

weapons or drugs in the Suburban and Mr. Smith replied he did not. "I then asked Mr. Smith if he would allow me to search his vehicle and he said yes."

So the fact of the matter is, Sergeant, that Mr. Smith wasn't arrested at that juncture for interference because you were asking for consent to search his vehicle. If he was under arrest, you could have just searched the vehicle. Is that true?

A I was going to search the vehicle regardless of whether he gave consent or not.

Q So your testimony today is that you didn't need consent?

A No, sir.

Q And it would be your testimony today that even though my client was handcuffed and asked at gunpoint whether or not he consented to search the vehicle, that this is a voluntary consent; is that correct?

A Yes, sir.

[47] Q Okay. I'd be correct in stating, would I not, Officer, that at no time did you advise Mr. Smith that he was under arrest for interfering with a police officer?

A That's correct, sir.

Q And at no time did you inform Mr. Smith that he had the right to refuse your request for consent to search his vehicle?

A That's correct. We had exigent circumstances, I believe.

Q I don't need your explanation, Sergeant. "Yes" or "no."

A Do you want an answer?

Q I want a "yes" or "no" answer to a "yes" or "no" question.

A Okay.

Q The answer is, no, you never advised him, correct?

A That's correct.

MR. SCHEITLER: If I may have a moment, Your Honor?

THE COURT: Sure.

Q (By Mr. Scheitler) Now, with regard to the search of the vehicle itself, I'd be correct in stating, would I not, that you initially searched the driver's compartment of the Suburban and you found no evidence of crime at that time?

A Can you rephrase that, sir.

Q You searched the front of his car and you found [48] nothing?

A Initially, no, I did not find anything.

Q And then Officer Bruce was searching the back passenger compartment and he found a handgun; is that correct?

A Yes, sir.

Q Okay. And then you joined Officer Bruce in the back compartment of the car. And at that point, you

found some cocaine in a compartment above the passenger compartment of the car; isn't that correct?

A No, sir.

Q Where did you find the cocaine?

A In the front area of the vehicle above the center console located between the front driver's seat and front passenger seat.

Q So then if Officer Bruce noted in his report that he took possession of a firearm and noticed a clip and thereupon gave it to Sergeant Rodarte who cleared it. He also observed an overhead console, referring to being in the back seat. Sergeant Rodarte opened the door and removed the baggie containing crack cocaine –

MR. ALLEN: Objection, Your Honor.

Q (By Mr. Scheitler) – he would be in error; is that correct?

MR. ALLEN: Defense counsel is editorializing. I think I would request that the statement be presented to the [49] Court to – to see what the officer – Officer Bruce actually wrote. And what Officer Bruce wrote and what Officer Rodarte is testifying to, I – I don't think that this is proper.

MR. SCHEITLER: I'll read it verbatim to the officer.

THE COURT: Fine. Why don't you repeat the question.

Q (By Mr. Scheitler) This is fine.

So Officer Bruce would be in error when he wrote in his report of the same date, "I opened the left rear passenger and observed a small door open in the center console and the grip of a semiautomatic handgun. I took possession of the firearm and noticed a clip in the handgrip." Well, I don't know what that means. "I gave the weapon to Sergeant Rodarte to clear and one round found in the chamber. I also observed an overhead console. Sergeant Rodarte opened the door and removed a baggie containing suspected crack cocaine. I took possession of all evidence for processing."

The fact of the matter is, Officer Bruce was in the back seat and you got in the back seat with him and you found the coke in the back seat in the overhead console?

A No, sir. I was not in the back seat with him.

Q No. So this is inaccurate?

A I believe from what you just read to me, it doesn't specify where the compartment is.

Q He just said he opened the left rear passenger. So I'm assuming that's the left rear passenger door; is that [50] correct?

A Yes.

Q So based upon that, it would be a fair assumption that the search took place in the back seat; is that correct?

MR. ALLEN: Objection. Objection, Your Honor. This is calling for speculation.

THE COURT: You know what? It's probably not worth the effort –

MR. SCHEITLER: I'll go forward.

THE COURT: – because more depends on the nature of the stop than it does where they found it in the car.

MR. SCHEITLER: I understand, Your Honor. Thank you.

Q (By Mr. Scheitler) Now, you're aware, are you not, Sergeant Rodarte, that Ms. Williams who was initially contacted for the felony auto theft, gave a statement claiming possession of the cocaine?

A I don't recall that, sir.

MR. ALLEN: Again, objection, Your Honor. Relevance to this.

THE COURT: Sustained. Not relevant for purposes of this inquiry.

MR. SCHEITLER: If I may have a moment, Your Honor?

THE COURT: Sure.

(Mr. Scheitler reading.)

Q (By Mr. Scheitler) It would be your testimony this [51] afternoon, Sergeant, that – that you placed Mr. Smith in custody and at that point – or in custody for interference, correct?

A Yes, sir.

Q And then he was searched subsequent to being placed in custody and a small quantity of marijuana was found in his pocket; is that correct?

A Yes, sir.

MR. SCHEITLER: If I may have a moment, Your Honor?

(Discussion off the record between Mr. Scheitler and the defendant.)

Q (By Mr. Scheitler) Isn't it true, Sergeant, that at the time that Mr. Smith was ordered out of the car and to his knees, that Officer Jones said, don't be messing around. You're messing with one of the best shots in the police force when he had his gun pointed at my client's head; isn't that correct?

A I don't recall that at all.

Q Now, when Mr. Smith allegedly gave consent to search the car, was he actually on his knees or was he laying on the ground? Because I believe you testified that he had – that he was put in a prone position and put the cuffs on.

A No, sir. We stood him upright after he was handcuffed when he gave consent.

Q Was he ever in the prone position on the car?

[52] A Yes.

Q And at what juncture was that?

A That was just prior to him being handcuffed by Officer Chambers.

MR. SCHEITLER: I'm sorry, Judge. If I could have just one more moment, I should be done with this.

THE COURT: Okay.

Q (By Mr. Scheitler) It would be your testimony today, Sergeant Rodarte, that your investigation revealed that Mr. Smith had no connection whatsoever with the stolen vehicle that Ms. Williams was driving?

A I wouldn't necessarily say that, sir.

Q Has my client been charged with the stolen – being –

MR. ALLEN: Objection, Your Honor.

Q (By Mr. Scheitler) – being involved with the stolen vehicle?

MR. ALLEN: Objection, Your Honor.

THE COURT: Sustained.

MR. ALLEN: Relevance.

THE COURT: Sustained.

MR. SCHEITLER: I have no further questions, Your Honor. Thank you.

THE COURT: Ok. Any redirect?

[53] **REDIRECT EXAMINATION**

BY MR. ALLEN:

Q Just so the record is clear, Sergeant, where is this overhead console compartment area located physically in the Suburban?

A It's in the front seat area. It's directly overhead between the front driver's seat and the front passenger seat.

Q And how far back does it extend?

A It goes from the windshield area to the middle of the front seat.

Q Now, defense counsel asked you some questions about the – the request for him to allow you to search his vehicle. He characterized that at gunpoint.

Take – I would ask that you address the following questions: First, what position was the defendant in – in other words, kneeling, lying, or standing – at the time that you asked him for consent to search?

A He was standing.

Q Okay. At the time you asked him for consent to search, where was your weapon?

A In my holster snapped in.

Q Were you aware at that time of any other officers standing nearby and the location of their weapons?

A Everybody had their holstered – weapons in holsters.

Q All weapons were holstered?

[54] A Yes.

Q What was the tone? You said you spoke to him very forcefully. What was the tone of your request to search his car after you had him handcuffed and standing?

A This was a matter-of-fact tone. It definitely wasn't the high-profile tone of voice that I had initially.

Q Did you make any threats or promises to get him to consent to search –

A No, sir.

Q – The vehicle?

MR. ALLEN: Okay. Nothing further, Your Honor.

THE COURT: Unless there is anything else?

MR. SCHEITLER: Just one follow-up, Judge, on that.

RECROSS-EXAMINATION

BY MR. SCHEITLER:

Q You've previously reviewed your report that you prepared on the evening in question is that correct, Sergeant?

A Yes, sir.

Q I'd be correct in stating, would I not, that there is no place in this report where it says that at any point Mr. Smith was standing when this episode took place?

A That's correct, sir.

MR. SCHEITLER: Okay. Thank you. I have no further questions.

THE COURT: The witness may step down. [55] Any additional witnesses for the People?

MR. ALLEN: If I might just have one moment, Your Honor.

THE COURT: Yes.

MR. ALLEN: At this point in time, Your Honor, I think based on everything that's come out, the People rest at this point.

THE COURT: Any witnesses for the defendant?

MR. SCHEITLER: No, Your Honor. Thank you.

THE COURT: Argument.

MR. ALLEN: All right. The testimony, Your Honor, today, has been that at approximately 2:50 or 3:00 a.m. in the morning, Officer Jones conducted a routine traffic stop just off the side of the on ramp to I-70 off of Peoria. Within a matter of the initial course of that stop, he finds a female, a lone female driver, who's driving a car without any registration. He runs the plates. The plate comes back unrelated to this vehicle. He then goes and gets the VIN number and via his computer, determines that the car is stolen.

He then calls in his traffic stop that he has a steal. And at this moment, the case becomes a – essentially a crisis situation for Officer Jones as Mr. Smith pulls up close behind in a large Suburban vehicle, highly unusual, catching Officer Jones between the stolen car and its driver and an unknown number of people in the Suburban.

[56] The testimony of both Officer Jones and Sergeant Rodarte is, this is an extremely dangerous situation. And according to Officer Jones, this was the first such episode that had ever occurred in his eight years as a police officer.

I would argue that everything that the police did from that point on was not only reasonable but prudent because of the highly dangerous nature of the situation.

THE COURT: So are you proceeding on the theory that they had probable cause to arrest or that this was though a heightened sense of officer safety involved, an investigatory stop?

MR. ALLEN: I would argue that there was more than ample reasonable suspicion to conduct a – a stop, and a stop at gunpoint of – Mr. Smith. I would also argue that there was probable cause to arrest Mr. Smith.

The reason I say both is that if the Court was unconvinced about the probable cause, I would rely on the reasonable suspicion, but for the following reasons, I would suggest to the Court that there was probable cause:

We have a stolen car. We have a – the driver of the stolen car making a cell phone call. Within minutes, this man shows up in a tinted-window, high-profile, large vehicle essentially trapping the officer between the two – two vehicles. As far as he's concerned, Mr. Smith could be a co-conspirator, a complicitor, or an accessory to the auto [57] theft. In other words, he may be there to distract the officer to allow the driver of the Jeep to escape. I mean, there's all sorts of possibilities there.

The fact that there may be – may or may not be an innocent explanation, the police are not required to explore all innocent explanations in their calculation of probable cause. So I think it is not unreasonable to believe that the defendant is involved with the – with the

auto theft. And I would refer the Court to 18-8-105(1) and (2)(d) which is the accessory statute.

Additionally, the police had probable cause to arrest the defendant for interference with the police investigation. The testimony was – was clear that this was a very threatening action that the defense – that the defendant took necessitating emergency response by three other police officers.

I think it's also clear the nature of – of the call that Sergeant Rodarte received, what effect that had on him. This was a potential ambush. Even if there had been no drugs or no guns found in the car, his actions were threatening to the police and necessitated pulling officers off of other duties and delaying and interfering with Officer Jones' investigation of the auto theft.

So as a result of all that – and I refer the Court both to the municipal ordinance for interference but also to [58] the Colorado Revised Statute 18-8-104(1)(a). I believe there was ample grounds to arrest for his actions based on interference. And as a result, they had reason to – or probable cause to arrest him and thus any and all searches of the defendant were valid based on a valid arrest – search incident to arrest.

If, however, the Court doesn't believe there was probable cause, I would argue that there was certainly reasonable suspicion. It's 3 o'clock in the morning. Officer Jones is alone. He is now caught between two vehicles. Terrifying situation. He has every reason to believe that the person who's pulled up behind him is meaning him harm. And if that is the case, that is clearly an articulable reason to believe that the defendant might

have been armed. And as a result, they not only have the right if it's an investigatory search but they have every right to search the vehicle for weapons as well.

Once they search the vehicle and find the semi – loaded semiautomatic handgun, they then have independent grounds to arrest him for carrying a concealed weapon.

So – and lastly, I would argue that there was also a valid consent to search. On the surface it sounds like it's not a very conducive environment to a valid consent, but I would ask the Court to consider this: What the police did was reasonable under the circumstances. No guns were pointed at [59] him; no threats were made. The fact that he was in handcuffs in and of itself does not make the consent involuntary. The police are not required to inform the defendant that he has the right to refuse. He made the statement to the police that there were no guns or weapons in the vehicle.

And so I would also argue that there was in addition, even though they didn't need to ask, that there was a valid consent to search as well.

And I have some case law which also indicates that handcuffs in and of themselves do not make a person unable to make a valid consent. Sergeant Rodarte testified that the tone with which he asked was matter of fact, not the loud, forceful demands to get out of the car.

That's the people's position, Your Honor.

THE COURT: Okay. Thanks.

Mr. Scheitler.

MR. SCHEITLER: Thank you, Judge.

It's my client's position and it's my position that this is another case of the end justifies the means.

What do we have here? We've got a traffic stop. A young lady stopped because she's got dangling objects. Mr. Smith pulls up behind Officer Jones. No testimony whatsoever that he blocked Officer Jones and that he couldn't move his police vehicle or ask Mr. – Mr. Smith to move his car.

[60] The prosecution's arguing that he blocked Mr. – or Officer Jones in is just not based on any evidence presented today. Additionally, the allegation that he was afraid there was an ambush is contradicted by Officer Jones' testimony.

Officer Jones arrives on the scene at 2:50. He places the call for backup as soon as Mr. Smith pulls in behind him. He sits in his car with his back to Mr. Smith for approximately eight minutes. Now, Judge, that just doesn't make any sense if he's afraid there's an ambush going to take place. Number 1, he's take – keeping an eye on Mr. Smith; No. 2, he takes his shotgun out; and No. 3, he moves his car. None of that took place.

Now, if the Court is to find that there was reasonable suspicion to contact Mr. Smith based upon the fact that he pulled up behind Officer Jones, then I would argue, Your Honor, that subsequent to removing Mr. Smith from his automobile, they had no probable cause whatsoever, No. 1, to search the vehicle; or No. 2, probable cause to arrest him and therefore do a full search of Mr. Smith.

The prosecution would have this Court believe that there was probable cause to arrest because there was interference with a police officer. There has been absolutely no testimony whatsoever that my client in any way interfered with what Officer Jones was attempting to do with Ms. Williams. Judge, that would be synonymous to me walking up to a car [61] length away from a police officer who was arresting somebody down in Lodo, not saying anything not doing anything, and being cited for interference. That's what they're – that is what – the jump the prosecution is asking you make because they found cocaine and a gun in his car subsequent to all this.

If I could have the prosecution's Exhibit No. 1?

THE COURT: I've got it here.

MR. SCHEITLER: If I could take a look at it, Judge. Thank you. I appreciate it.

(The Court handing People's Exhibit No. 1 to Mr. Scheitler.)

MR. SCHEITLER: The prosecution relies on Section 38-31 which I'm assuming is out of the Denver municipal ordinances. "It shall be unlawful for any person in any way to interfere with or hinder any police officer, any members of the police department, or any person duly empowered with police authority while such officer or person duly empowered with police authority is discharging or apparently discharging their duties."

There is no evidence whatsoever before this Court that would allow this Court to make that determination. To the contrary, Your Honor, the evidence that is before

this Court is, No. 1, Mr. Smith was dragged out of his car – excuse me. Let me rephrase that.

Mr. Smith was ordered out of his car at gunpoint. He [62] was placed on the concrete with his hands behind his head, his legs crossed, and handcuffed. At that point, with weapons drawn, the officers said, oh, by the way, you don't mind if we search your car.

This Court is well aware that in order for there to be an exception to the warrant requirement, No. 1, there's got to be consent. Do you think for one second that this sergeant, if he thought he had probable cause to arrest my client, would have even talked to him about searching that car? You know and I know based upon the testimony today that that's not what happened.

This young man was placed in fear of his life. And at that juncture, the officer asked if he could search his car. What was Mr. Smith supposed to say, Judge? No? Under those circumstances? You know that this is – this is a balancing test, a totality-of-the-circumstance test; whether or not by the totality of the circumstances based upon the evidence presented, whether or not there was undue coercion employed in order to obtain that consent. It is our position that there was, that Mr. Smith had no other alternative but to consent.

And for the prosecution to argue today that he was interfering with the police and, therefore, they had probable cause to arrest, therefore, they had – they had an exception to the warrant requirement and they could search his person and the car, just does not wash based upon these circumstances.

[63] Consequently, we'd ask that any and all evidence seized pursuant to the – No. 1, the invalid search – or stop, search, and seizure, be suppressed and any statements that were elicited from my client also be suppressed and stricken.

Thanks.

THE COURT: Okay. Thanks.

Anything by way of rebuttal for the People?

MR. ALLEN: I don't believe so, Your Honor.

THE COURT: Okay. Before we finish up, let me see if Mr. Andre and his client would like to leave. Are you ready?

(Discussion off the record.)

THE COURT: Fine. We'll finish this up.

All right. Returning then to People v. Smith, 99-CR-1071. The Court makes the following findings and conclusions.

The Court finds that on the date in question, the 15th of March, of 1999, Officer Jones was on patrol in the vicinity of I-70 and Peoria. He saw a car going northbound on Peoria. It was his testimony that he pulled the car over for a traffic violation. It was a '98 Jeep Cherokee.

His testimony was that the traffic violation at issue was hanging objects from the mirror. He pulled it over from – on the westbound ramp. It was in the early morning hours. The lighting conditions as he indicated, were that it was dark outside but lit by a lamp.

[64] He was alone in his car on solo patrol. He contacted the driver of the vehicle, a Natalie Williams, a female. She was alone. And he got the ID, he got the license, and he asked whose car it was and she said it belonged to a friend. She had no paperwork ready to give to him.

He went back to his car, ran the license on the computer in his car and got no record. He then tried the VIN number, put that into the computer and it came back indicating that the car was a stolen car out of the jurisdiction of Denver. He called it in as a stop for a stolen car.

In the meantime, he had seen – he'd observed the female driver make a cell phone call from the car that he had stopped while he was calling this in. And shortly thereafter, another car pulled up. The second car, a GMC Suburban, pulled up behind him. Behind the police car.

He indicated that the car had its headlights on, and he became very concerned about his safety. He immediately called for cover. He wanted some backup and some assistance. And he did not emerge from his car, nor did the driver of the Suburban, nor did the driver of the Jeep. The Suburban, he testified, nor did the driver of the Jeep. The Suburban, he testified, was not directly behind him but was a half a car length to a car length behind him.

But nevertheless, he testified that he had never had that happen before and that he became very concerned about the prospect of ambush in the early morning hours, and it was – it [65] seemed to him unusual. He thought people who are stopping at the site of a traffic stop would ordinarily pull in front of the other cars, not behind them.

Approximately eight minutes later, Sergeant Rodarte who also testified emerged. There's really no factual dispute about what happened here. Sergeant Rodarte's testimony is consistent with that of Officer Jones.

Upon arriving, Sergeant Rodarte emerged from the car. Officer Jones emerged from the car. Other backup arrived, and they approached the Suburban and did so at gunpoint, as they indicated, for officer safety.

The testimony of Officer Jones is that at no time did the defendant do anything wrong as it was characterized. He simply sat there in his car. It was the fact that he was sitting there that concerned Officer Jones and caused him some anxiety.

When Sergeant Rodarte got there, the two of them went back. Sergeant Rodarte and Officer Jones drew their guns. They ordered the defendant out of the car. Rodarte approached the car from the rear; Officer Jones from the front. They ordered him to toss the keys out the window. They ordered him out of the car. They saw no weapons. They immediately put him on the ground and put his hands – had his hands laced behind his head, all the while at gunpoint. He was immediately cuffed.

[66] At the same – at approximately the same time, another car had pulled up, another police car providing assistance. So there were as many as four officers in attendance at the scene of the incident.

And the testimony of Sergeant Rodarte is consistent. He was – he got the call. He was a District 5 sergeant. He arrived at the scene and saw the second car behind the police car.

It's his testimony – and he was candid about it – that he ordered the defendant out of the car very forcefully as he characterized it. Very forcefully ordered the defendant to toss the keys out of the window. The defendant did so. And they all ordered the defendant out of the car. By now, there was Sergeant Rodarte, Officer Jones, and two other officers. They ordered him to keep his hands up at gunpoint.

And he was asked – the defendant was asked if he had any weapons on his person or in his car. He indicated he did not. It was the testimony of Sergeant Rodarte that he was asked if they could search the car. He indicated they could.

It was Sergeant Rodarte's testimony that – the essence of his testimony that they were going to search under any circumstances. They did search the car. They recovered a weapon and a quantity of a substance that would appear to be controlled substance.

He testified on cross-examination, the defendant never [67] tried to exit the car until he was ordered out of the car or make any movement until he was ordered to move. He also testified that Officer Jones did tell him that it appeared there was only one person in the car, indicating that Officer Jones was at least able to keep an eye on the defendant; which is a finding the Court makes, entirely consistent with Officer Jones' willingness to sit there with his back to that car for eight minutes, something defense counsel thought was significant.

It would clearly appear that Officer Jones was at least able to monitor the fact that the driver of the car behind him was sitting in the car and did not emerge and was

not emerging and hadn't pointed anything at him. And, in fact, that's corroborated by the fact that Jones told Rodarte that there was only one person in the car.

The Court – the inquiry here is pretty straightforward. The first question is simply, upon the arrival of Sergeant Rodarte and the approach of the car, was there, in fact, probable cause to arrest based on the violation of Denver Municipal Code 38-31? The Court finds very clearly there was not.

This Court has been an awful lot of interference cases over the years at traffic stops. And to a case, they all involve some big mouth getting out of the second car and approaching the officer who's trying to write a ticket and [68] making a pest of himself or herself to the point where the officer who never really sets out to write an interference ticket, ends up writing an interference ticket just so they can get on with the traffic citation they began to write. I've got to admit I've never seen one where nobody emerged from the second car.

The ordinance reads, "It shall be unlawful for any person in any way to interfere with or hinder any police officer in discharging or apparently discharging his duties." The fact that Officer Jones felt a degree of anxiety and felt that that delayed his processing of the stolen car or the traffic stop as it applied to the female driver is an entirely subjective – it's an entirely subjective perspective for officer Jones.

There is no objective evidence here that the defendant did anything about could be characterized as interference, that could be characterized as a hindering with

the conduct of the police officer in attempting to discharge his duties. The fact that the officer felt some anxiety and determined that he would not discharge his duties until he had dealt with the driver of the second car was a subjective determination the officer made. And I confess at a subjective level to understanding it completely. It made a lot of sense at that hour of the morning, but it does not elevate the conduct of the defendant to interference with police authority. And there is clearly no [69] probable cause to arrest based on the violation of the municipal ordinance.

And let's get this finding out of the way. And make no mistake about it. The defendant was arrested on the spot by Officer Jones and Sergeant Rodarte.

In order for this case to turn on an investigatory stop as opposed to an arrest based on probable cause, we would have to have an entirely different factual determination here. Probable cause itself is fact specific as an inquiry. It must be resolved based on the totality of the circumstances, *Beck v. Ohio*, 379 U.S. 89, 1964. In this case, the Court's already indicated that there was no probable cause for an arrest. So we turn our attention to the conditions for a valid investigatory stop.

First of all is the existence of a specific and articulable basis in fact for suspecting that the person subjecting – subject to the stop has engaged in or is presently engaging in or is about to commit a criminal act. In this case, the Court finds that what is determinative is not the officer's subjective intent. Although that is a factor that

the Court may consider in determining whether the purpose of an intrusion was reasonable, it is not critical to a resolution of that question. *People v. Cagle,* 688 P.2d at 722.

The – really the question is – that is determinative here is whether the purpose of the intrusion was reasonable in [70] light of the objective circumstances that confronted the officer at the time and the place in question. A police officer making a valid investigatory stop may make a further limited intrusion into the personal privacy or security as long as that additional intrusion is strictly tied to and justified by the circumstance which rendered the initiation permissible; *People v. Ratcliffe,* 778 P.2d 1371.

This might be a different case had Officer Jones perhaps unwisely determined that he would approach the car on his own with gun drawn in order to ask questions of the driver. But this is a case in which we had at a minimum, two – and based on the evidence the Court heard, the Court finds four police officers, guns drawn, making the – what is characterized as an investigatory detention of a suspect.

The Court clearly finds under the circumstances in this case that the range of police activity permitted by such a detention must be reasonably related again to those circumstances. They could certainly detain somebody to ask their identity. They could certainly order the occupant of the vehicle out of the car if they had a reasonable suspicion that the occupant had engaged in criminal activity. Their action, if it exceeds the bounds of a reasonable suspicion, becomes an arrest and then must be supported by probable cause.

And the Court, in this case, finds that under this set of circumstances, the – given the scope and nature of the [71] restraints placed on this individual's liberty, the Court cannot find that the intrusion was reasonably related to a reasonable suspicion of criminal activity. This was an arrest, a custodial arrest, plain and simple. It was an arrest made by a number of police officers emerging from their cruisers, ordering the defendant out of the car at gunpoint, hands placed behind head, cuffed, placed on the ground. For similar circumstances resulting in a determination of custodial arrest, see *Olivera v. Mayer*, 23 F.3d, 642, Second Circuit 1994; *U.S. v. Martinez*, 808 F.2d 1050, Second Circuit 1987; *U.S. v. Richardson*, 949 F.2d 851, Sixth Circuit 1991; *U.S. v. Robinson*, 30 F.3d 774, Seventh Circuit 1974; and *U.S. v. Ricardo D.*, 912 F.2d 337, Ninth Circuit 1990; as well as *U.S. v. Anderson*, 981 F.2d 1560, a Tenth Circuit case from 1992.

It's not just the tone of voice used. It's not just the command to throw the keys out the window, emerge in a kneeling position, hands behind head. It's not just the guns leveled at the defendant. It's not just the fact that he was immediately cuffed. It is the totality of all of those circumstances that clearly indicates to this Court that the – under the circumstances, this was not a valid investigatory stop based on limited intrusion into the personal privacy or the security of the suspect based on any reasonable suspicion or articulable suspicion of criminal activity he had been engaged in or was about to be engaged in.

[72] The Court confesses to a clear understanding of Officer Jones' level of anxiety and Sergeant Rodarte's determination based on what he knew that this was the

way to go. And the court is not suggesting that there was somehow an unintelligibly excessive use of force under those circumstances, that it was imprudent, that it was not something that officer safety at least arguably required. But what the Court is suggesting is that if this is the way you're going to go with that many officers, that many guns, and that kind of determination at the scene, you can't possibly expect to use the fruit of the search that is conducted after the arrest based on a lack of probable cause.

The Court finds that the – the detention was 100 percent custodial from the moment that Sergeant Rodarte arrived.

And there was no valid consent. This was not a noncustodial consent offered by the defendant. And Sergeant Rodarte pretty clearly indicated candidly that they were going to search that car under any circumstances. And clearly, the defendant was in custody at the time. He had been cuffed. Whether he was then propped up on his feet or allowed to stand, he was still cuffed. He had still been placed in cuffs at gunpoint; had still been ordered out of the vehicle in a fashion consistent with arrest.

And the Court finds that there is neither probable [73] cause to support the arrest nor that this was a valid investigatory stop based on a limited intrusion into the personal privacy or security of the defendant for a reasonable purpose under the totality of the circumstances.

The Court grants the Motion to suppress. The evidence that consists of the suspected controlled substance, the gun, and any other evidence at this time – is at this time suppressed.

Do you require any additional finding or ruling, Mr. Allen?

MR. ALLEN: Yes, Your Honor. I would ask for some clarifications.

For the record, is it the Court's finding that there was not reasonable suspicion to contact Mr. Lewis (sic) or is the Court finding –

THE COURT: There was a reason to contact him and they could have contacted him. But the degree of force was unreasonable under the circumstances. They had four officers. Despite the fact that it was at night, they could have made some inquiry. And the fact that they chose to do it by making a custodial arrest exceeded that which they are allowed to do based on an investigatory stop lacking probable cause. This is the finding of the Court.

MR. ALLEN: If I could just supplement the record.

THE COURT: Well, you can supplement it at the [74] Supreme Court if you want to take a Rule 21. If you are going to tender cases –

MR. ALLEN: That's fine. Okay.

MR. SCHEITLER: I would object to supplementation of the record at this time, Your Honor.

THE COURT: Well, what do you want to do?

MR. ALLEN: I just want to make a clear record on – on a couple points.

MR. SCHEITLER: I'd object to additional argument, Your Honor.

THE COURT: Let me hear what it is he wants to do.

MR. ALLEN: The Court has made it clear that there are – there were grounds for –

THE COURT: Okay. You're not asking for an additional finding here. You really want to argue about the findings. And really, I'm not –

MR. ALLEN: Actually, I'm sorry, Your Honor.

THE COURT: You're done. The time to do that is prior to the Court's ruling. You can do this in the Supreme Court on a Rule 21.

MR. ALLEN: Okay.

THE COURT: Okay. And assuming that's what you want to do, that's fine. The Motion for Suppression is granted.

Bond is discharged.

MR. ALLEN: Thank you.

[75] MR. SCHEITLER: Thank you, Your Honor.

THE COURT: Well, what do you want to do? I guess we need to reset this probably if – do you want to take it up, Mr. Allen? You want to confer?

MR. ALLEN: Yes. I'm going to confer, Your Honor.

THE COURT: And I believe it's ten – is it 10 or 15 days? I think it's 15.

MR. ALLEN: Let's reset it for ten.

THE COURT: It's a condition of his bond. I'm going to reset this for return and see what Mr. Allen wants to do.

MR. SCHEITLER: You're going to continue the bond, Judge?

THE COURT: I'm going to continue it to the next court date and see what happens with the district attorney.

When do you want to do this?

MR. ALLEN: Well, let's see. Today is the 9th. I would ask that we do it nine days from today –

THE COURT: Friday the 18th.

MR. ALLEN: – if that's all right with defense counsel.

THE COURT: Sure. Are you available?

MR. SCHEITLER: At what time, Judge? In the afternoon?

THE COURT: Afternoon is fine. Morning is fine. What would you prefer?

MR. SCHEITLER: Afternoon would preferable.

THE COURT: The 18th at 1:30.

That's a bond return date for you, sir. Bond is not discharged. So we'll wait for further determination by the People.

Thank you.

MR. SCHEITLER: Judge, we had one additional question along those lines. Is he still to comply with the terms and conditions of the drug court?

THE COURT: Yeah. Which obviously hasn't been a problem for him. He's been clean on every UA, so . . .

MR. ALLEN: I would ask if I could get a transcript of the hearing.

THE COURT: Well, you talk to the reporter about that.

MR. ALLEN: Okay.

(The hearing concluded at the hour of 3:45 p.m.)

OFFENSES, MISCELLANEOUS PROVISIONS – OBSTRUCTION OF JUSTICE

ARTICLE II. OBSTRUCTION OF JUSTICE*

Sec. 38-31. Interference with police authority.

(a) It shall be unlawful for any person, in any way, to interfere with or hinder any police officer, any member of the police department, or any person duly empowered with police authority while such officer, member, or person duly empowered with police authority is discharging or apparently discharging their duties.

(b) It shall be unlawful for any person, in any way, to interfere with or hinder any deputy sheriff, prison steward or deputy warden while any such officials are discharging or apparently discharging their duties.

(c) It shall be unlawful for any person to fail to obey a lawful order of a police officer if such failure interferes with or hinders such police officer in the discharge of his official duties. It is an affirmative defense to this subsection that the failure to obey did not interfere with or hinder the police officers.